BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND I. MYERS III	)	
Claimant	)	
VS.	)	
	)	Docket No. 137,688
INDIAN CREEK WOODS TOWNHOMES ASSOC. I	)	
Respondent	)	
AND	)	
	)	
UNINSURED	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both the claimant and the respondent appeal from an Award entered by Administrative Law Judge Robert H. Foerschler, dated December 2, 1993. The Appeals Board heard oral argument in person in Overland Park, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Richard H. Wagstaff III of Overland Park, Kansas. Respondent appeared by and through its attorney, Mark C. Owens of Prairie Village, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Robert L. Kennedy of Kansas City, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent, in its Application for Review, raised the single issue of:

(1) Whether claimant was an employee of the respondent or an independent contractor on the date of accident.

The claimant, in his Application for Review, raised the following issues:

(2) Whether the respondent met the payroll requirements of K.S.A. 44-505(a)(2) (Ensley).

(3) Whether temporary total disability payments are due the claimant.

(4) Nature and extent of claimant's disability.

(5) Claimant's need for future medical treatment.

(6) Whether the Kansas Workers Compensation Fund is liable for compensation benefits, if awarded, pursuant to K.S.A. 44-532a (Ensley).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board, after a review of the evidentiary record and arguments of the parties, finds as follows:

(1) In May 1989, the claimant, Raymond I. Myers III, was hired by the respondent, Indian Creek Woods Townhomes Association I, to perform general maintenance of the common areas owned by the respondent. Respondent's Board of Directors approved the hiring with John R. Cochran, Treasurer, notifying claimant of the approval.

Respondent is a not-for-profit corporation organized under the laws of the State of Kansas, responsible for the administration, maintenance, repair, and replacement of dwelling unit exteriors, garage exteriors, and common areas. The claimant's specific duties were to pick up trash, trim bushes, water grass, pull weeds and keep the general area around the swimming pool cleaned up. Claimant's long-time friend and college roommate, Michael Burns, referred him to the respondent for the job as he had worked for the respondent the two (2) previous summers performing the same general maintenance work.

Claimant, on June 16, 1989, only four (4) weeks after he started working for the respondent, was involved in a very unfortunate accident. He fell from the top of the fence that was surrounding respondent's swimming pool and suffered a burst fracture of the cervical vertebras C-5 and C-6, resulting in quadriplegia and paralysis of the bowel and bladder.

The first issue that the Appeals Board is requested to review is whether the claimant, on the date of his accident, was an employee of the respondent or an independent contractor. The Kansas Workers Compensation Act defines an “employee” as any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. The definition excludes an individual employer, limited or general partner or self-employed person. See K.S.A. 1988 Supp. 44-508(b). However, if the claimant was an independent contractor on the date of his injury, the parties are not subject to the provisions of the Act. McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965).

An independent contractor exercises independent employment by contracting to do a job according to his own methods and is only subject to control of the employer as to the end product or final result. Krug v. Sutton, 189 Kan. 96, 366 P.2d 798 (1961). Whereas, in order for an employer/employee relationship to exist, the most significant factor to consider is the employer's right to direct and control the method and manner of doing the work. In fact, the right to control is more important than the actual exercise of control. Although the right to control is the most significant factor, other considerations indicative of an employee/employer relationship are the employer's right to discharge, payment made by the hour rather than the job, and furnishing of equipment. Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

When claimant was hired to perform the general maintenance duties by the respondent for the summer of 1989, he was paid hourly; was instructed to not work over twenty-five to thirty (25-30) hours per week; used both his own tools and tools furnished by the respondent; had contact with John Cochran approximately two (2) times per week; took separate orders on occasion from other Association members; and, could have been terminated by the respondent for not performing his job duties correctly or acting in a careless or negligent manner. Claimant also established through his testimony that he would have performed jobs other than his regular general maintenance if requested to do so.

The Administrative Law Judge found that the evidence presented by the claimant as a whole established that the claimant was an employee of the respondent and not an independent contractor. Respondent argued that the claimant was hired as an independent contractor as all services needed by the respondent were provided by independent contractors. Respondent contended that it did not have any employees. The Board of Directors of the respondent did not have the experience necessary to maintain the common areas that they were responsible for, so they had to hire contractors and individuals who had the expertise to obtain the final result.

The Appeals Board, after an extensive review of the evidentiary record, finds that the evidence supports the finding that the claimant was an employee of the respondent and not an independent contractor. Thus, the Appeals Board affirms the Administrative Law Judge in regard to this finding. The respondent had the right to control and did exercise control over the menial job tasks performed by the claimant.

(2) Having found that an employee/employer relationship existed for purposes of coverage under the Act, the next issue the Appeals Board shall address is whether the respondent met the requisite payroll requirements for the parties to be subject to the Act.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends. Hughes v. Inland Container Corp., 247 Kan. 407, 410, 799 P.2d 1011 (1990). Claimant's burden to prove coverage under the Act also includes whether the respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a)(2) (Ensley). Brooks v. Lochner Builders, Inc., 5 Kan. App. 2d 152, 154, 613 P.2d 389 (1980).

The pertinent provisions of K.S.A. 44-505(a) (Ensley) provide:

> "[T]he workmen's compensation act shall apply to all employments . . . except . . . (2) any employment, . . . wherein the employer had a total gross

> annual payroll for the preceding calendar year of not more than $10,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $10,000 for all employees, . . ."

In the instant case, the respondent contends that in 1988 and 1989 it did not have any employees and consequently did not have a payroll. However, as found by the Administrative Law Judge and affirmed by the Appeals Board, the claimant was an employee of the respondent in 1989. Also, the Appeals Board finds, from the testimony of Michael Burns, that he was an employee of the respondent during the time he worked for the respondent in the summer of 1988. The record established that the claimant was paid only $573.75 in 1988 and Michael Burns was paid only $1,528.46 of which $150.18 was reimbursement for equipment or materials he purchased.

The claimant argues that the respondent's payroll requirement contained in K.S.A. 44-505(a)(2) (Ensley) is satisfied by including the payroll that the contractor's employees earned while they performed necessary services for the respondent in 1988 and 1989. The claimant contends that by operation of law, K.S.A. 44-503(a) (Ensley) applies to this case and since these contractor's employees are statutory employees of the respondent, the amount paid to the statutory employees should be included for purposes of determining the amount of payroll to satisfy the requirements of K.S.A. 44-505(a)(2) (Ensley).

The Administrative Law Judge, in his decision, rejected claimant's argument and found first that the contractor's payrolls could not be used for determining the respondent's payroll requirements because workers compensation insurance premiums are generally based on the size of the insured's payroll. If statutory employees were included, then it would be impossible to compute a premium. The second reason that the Administrative Law Judge found that K.S.A. 44-503(a) (Ensley) does not apply in this case is that the respondent is not involved in a trade or business. Therefore, it cannot contract out work that is part of respondent's trade or business to be performed by an independent contractor as required for K.S.A. 44-503(a) (Ensley) to apply. Accordingly, since the homeowners' association was not engaged in trade or business enterprise, contractors hired by the respondent were not performing work which was part of the respondent's (principal's) trade or business as required by K.S.A. 44-503(a) (Ensley).

The Appeals Board agrees with the Administrative Law Judge in reference to his finding that the respondent was not engaged in a trade or business and therefore the provisions of K.S.A. 44-503(a) (Ensley) cannot be construed to include the employees of the contractors hired by the respondent to perform services in 1988 or 1989 as statutory employees. Respondent is simply an association composed of members who own townhomes in a subdivision. It is not a commercial, manufacturing, trade, or other business enterprise. These members have incorporated for the purpose of owning the common areas of the subdivision and maintaining the exterior of the townhomes and the common areas. Respondent is a not-for-profit corporation not engaging in commercial business activities as contemplated by terms used in K.S.A. 44-503(a) (Ensley).

The Appeals Board finds it is unnecessary to address claimant's further argument that the employees of the contractors hired by the respondent (statutory employees) should be included in determining whether the respondent qualifies for the payroll exclusion under K.S.A. 44-505(a)(2) (Ensley).

(3)(4)(5)(6) Since the Appeals Board has affirmed the Administrative Law Judge's decision that the Kansas Workers Compensation Act does not apply to the parties herein, all other issues raised by the claimant are rendered moot and will not be addressed by the Appeals Board.

The Appeals Board adopts and incorporates all of the findings of Administrative Law Judge Robert H. Foerschler as set forth in his Award of December 2, 1993, to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated December 2, 1993, denying claimant, Raymond I. Myers III, workers compensation benefits, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's construction of K.S.A. 44-503(a) (Ensley). The majority has concluded that K.S.A. 44-503(a) (Ensley) applies only to certain types of employers, those which are a "trade or business." Some employers, according to the majority, are not a "trade or business" and may therefore subcontract for the performance of all or part of their work without incurring workers compensation liability. The pertinent portion of K.S.A. 44-503 (Ensley) states:

> "(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business . . . and contracts with any other person (in this section referred to as the contractor) for the execution of . . . any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation

> act which the principal would have been liable to pay if that worker had been immediately employed by the principal . . . . "

I think the majority has misplaced the modifier. The phrase "trade or business" is not, in my opinion, intended to modify or limit the "any person" to which the statute otherwise applies. If it were intended to do so, the phrase would have been placed near the "any person" such as — where any person who operates a trade or business contracts . . . . Instead the phrase is used after the word "work" and is used in the statute to modify and limit the types of contracted work which will make the principal subject to liability. The phrase "trade or business" is not a term of art and has no special use or definition in the Act. It is used here only as a way of referring to what the principal does, not as a limitation of application of the statute. K.S.A. 44-503(a) (Ensley) should apply to all types of employers but only certain types of work, i.e., the type in which the employer normally engages.

I also think it is appropriate, when determining whether the employer qualifies for the payroll exclusion under K.S.A. 44-505(a)(2) (Ensley), to include money paid employees of the subcontractor(s) on work done for the principal. First, inclusion of such amounts is consistent with language of the statutory employee provisions of K.S.A. 44-503(a) (Ensley). That statute makes the principal liable for any compensation the principal would be liable to pay ". . . if that worker had been immediately employed by the principal . . . ." The language suggests that the statutory employee should be treated as the equivalent of a common law employee of the principal. Nothing in the Act contradicts that suggestion.

Second, inclusion of such amounts is consistent with policy and purpose of both the payroll requirement in K.S.A. 44-505(a)(2) (Ensley) and the statutory employee provisions in K.S.A. 44-503(a) (Ensley). The payroll requirement is intended to exclude from the Act small employers for which the burden might be inappropriate. The employer with in excess of $10,000 in contracted services should be no less capable of bearing the burden than employers with employee payroll in excess of $10,000. The statutory employee provisions of K.S.A. 44-503(a) (Ensley) prevent an employer from circumventing the Workers Compensation Act by subcontracting. The policy behind K.S.A. 44-503(a) (Ensley) is better enforced by including the amounts paid subcontractor's employees on the work done for the principal to determine whether the Act applies.

Finally, the Administrative Law Judge concluded amounts paid the subcontractor's employees should not be included because it would make premium calculations difficult. If this is true, the problem already exists under K.S.A. 44-503(a) (Ensley) for a principal otherwise subject to the Act. The principals can, on the other hand, protect themselves under the current statutory scheme by requiring subcontractors to provide workers compensation coverage. As written, I conclude the Act requires coverage any time the principal's work, by either common law or statutory employees, has an annual payroll in excess of the statutory limits.

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BOARD MEMBER

I also join in the above dissent, but only as it relates to the issue of whether respondent was engaged in a "trade or business" as contained in K.S.A. 44-503(a) (Ensley). I do not agree with the dissent's argument that money paid statutory employees should be included in determining an employer's payroll as required by K.S.A. 44-505(a)(2) (Ensley).

BOARD MEMBER

c: Richard H. Wagstaff III, Overland Park, KS
Mark C. Owens, Prairie Village, KS
Robert L. Kennedy, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director